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# In the Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-1538

ALAN HERBERT ABRAHAMS, A/K/A
JAMES A. CARR, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-17a) and the order of the district court denying bail (Pet. App. 1a-7a) are not reported. On May 4, 1978, Mr. Justice Brennan denied petitioner's application for bail.

### JURISDICTION

The judgment of the court of appeals was entered on April 19, 1978. The petition for a writ of certiorari was filed on April 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. 3146 provides in part:

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;



(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

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## QUESTIONS PRESENTED

1. Whether petitioner's challenge to the denial of bail in this case has become moot as the result of his imprisonment on an unrelated conviction.

2. Whether, in the circumstances of this case, the order denying petitioner bail pending trial violated his rights under either the Eighth Amendment or 18 U.S.C. 3146.

## STATEMENT

1. On January 10, 1978, petitioner was arrested in Massachusetts pursuant to a federal warrant issued in Michigan and was brought before a United States magistrate.[1] At this appearance, petitioner falsely claimed

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[1]Petitioner was represented by counsel at this proceeding (Pet. App. 9a).

to have no criminal record and concealed his true identity by using an alias. A hearing on removal of petitioner to Michigan pursuant to Fed. R. Crim. P. 40(b) was scheduled for January 18, 1978, and petitioner was released on $100,000 surety bond (Pet. App. 9a). He failed to appear, however, and on January 25, 1978, was arrested in Florida, where he had changed his hair color and registered in a motel under an assumed name (*id.* at 2a, 9a). On the following day, petitioner was indicted in Massachusetts for violation of 18 U.S.C. 1001.[2] On February 16, 1978, petitioner was arraigned on that charge. The magistrate ordered him held without bail, finding that "[t]he risk of flight is immeasurable" (Pet. App. 10a).

Petitioner subsequently requested the district court to admit him to bail. At an evidentiary hearing on March 6, 1978, the following facts, in addition to the facts shown above, were proven: petitioner had three prior convictions and had escaped from a New Jersey state prison while serving a sentence of imprisonment for four-to-six years;[3] petitioner was a fugitive from California proceedings; petitioner was sought on charges of probation violation in the Southern District of New York and criminal contempt in the Western District of Michigan; petitioner faced several civil suits related to his business; during the preceding four years, petitioner had lived with his family

[2]18 U.S.C. 1001 makes it a crime for anyone to make a false statement in connection with "any matter within the jurisdiction of any department or agency of the United States * * *."

[3]In October 1974, petitioner was sentenced to two consecutive two-to-three terms of imprisonment and to a concurrent one-year term pursuant to a three-count fraud conviction in Monmouth County, New Jersey (No. 909-73). In December 1974, he escaped from prison while serving that sentence. Petitioner has been indicted in Mercer County, New Jersey, for that escape, and another fraud indictment has been returned against him in Monmouth County. Detainers on both of these charges have now been lodged.



in Canada, the Bahamas, California, and Massachusetts, using at least five different surnames; and according to the government's uncontradicted assertion, petitioner had transferred $1,500,000 to Bermuda (Pet. App. 1a-5a, 9a-11a).

On the basis of these facts, the district court refused bail, ruling that "none of the five conditions spelled out in 18 U.S.C. §3146(a), or any combination thereof, will reasonably assure the appearance of [petitioner] for trial if admitted to bail" (Pet. App. 7a). The court of appeals affirmed, holding that "[t]his is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail" (Pet. App. 17a). On May 4, 1978, Mr. Justice Brennan denied a renewed application for bail.

2. On April 21, 1978—the day following the decision of the court of appeals in this case—petitioner was sentenced to the custody of the Attorney General for a term of imprisonment of two and one-half years by the United States District Court for the Southern District of New York.[4] This sentence, which petitioner is presently serving, resulted from the revocation of a prior probationary sentence for a conviction under 26 U.S.C. 7201 for evasion of federal income taxes. The validity of this sentence is not before the Court in this petition.

## ARGUMENT

1. Since petitioner is now serving a sentence of imprisonment in the custody of the Attorney General, he is not eligible for bail on other pending charges. *United States* v. *Minker*, 326 F. 2d 411 (C.A. 3) (*per curiam*); see *United States* v. *Seegers*, 433 F. 2d 493, 495 and n. 21

[4]The Attorney General has designated that petitioner be incarcerated in the federal penitentiary at Lewisburg, Pennsylvania.

(C.A.D.C.) (*per curiam*); cf. *Morgan* v. *United States*, 380 F. 2d 686, 699 (C.A. 9). Accordingly, petitioner's challenge to the denial of bail on the charges pending in this case is now moot.

This case does not fall within the narrow exception to the mootness doctrine as a matter "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515. As this Court explained in *Weinstein* v. *Bradford*, 423 U.S. 147, 149, "*Sosna* [v. *Iowa*, 419 U.S. 393,] decided that in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." See *Securities and Exchange Commission* v. *Sloan*, No. 76-1607, decided May 15, 1978, slip op. 5.

This case satisfies neither branch of this test. In the first place, an application for bail to this Court would ordinarily be heard prior to the commencement of the applicant's trial and thus prior to any conviction that would make the bail proceeding moot.[5] Moreover, the intervening circumstance that has made petitioner's application for bail moot in this case—his imprisonment on an unrelated conviction—is far from the ordinary course of events. Since a bail application would normally be reviewed in this Court prior to the "cessation or expiration" of the bail controversy, the first branch of the test in *Sosna* is not fulfilled.

[5]Petitioner's trial in federal district court is scheduled for June 1978. Petitioner's application for bail was denied by Mr. Justice Brennan on May 4, 1978.



Moreover, there is no "reasonable expectation" that petitioner will be affected by the same order in the future. Trial has been set on the charges involved in this case for the last week of June 1978. In view of the prison sentence petitioner is currently serving, it is highly improbable that he will be eligible for bail prior to trial, or before final disposition of the charges. The "mere possibility" that petitioner may commit another crime after his release from all current terms of imprisonment, and the further speculative supposition that he may again be refused bail, does not "serv[e] to keep the case alive." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633. See *Weinstein* v. *Bradford*, *supra*, 423 U.S. at 148-149.[6]

2. In any event, in the circumstances of this case, the district court correctly determined that no conditions of bail would assure petitioner's presence at trial, and thus it properly denied bail.

The Eighth Amendment mandates that bail may never be "excessive," but it does not establish an absolute right to bail pending trial. *Carlson* v. *Landon*, 342 U.S. 524, 545-546; *Mastrian* v. *Hedman*, 326 F. 2d 708, 710-711 (C.A. 8), certiorari denied, 376 U.S. 965.[7] Similarly, while 18 U.S.C. 3146 creates a statutory bail procedure, the right to bail under that statute is not absolute. See *United States* v. *Kirk*, 534 F. 2d 1262, 1281 (C.A. 8); *United States* v. *Smith*, 444 F. 2d 61, 62 (C.A. 8), certiorari

[6]In *Weinstein*, a prisoner's suit challenging the legality of parole eligibility procedures was held to be moot upon his release on parole. 423 U.S. 147-149. The Court held that there was "no demonstrated probability" that the released prisoner would commit another offense and again be subject to imprisonment, and that the controversy was therefore moot. *Id.* at 149.

[7]Petitioner's contention (Pet. 11-12) that the refusal of the district court to admit him to bail constitutes cruel and unusual punishment is frivolous.

denied *sub nom. Haley* v. *United States*, 405 U.S. 977. Courts retain inherent authority to deny bail in advance of trial in extreme and unusual circumstances—including when it is apparent that no release conditions would reasonably assure the defendant's appearance at trial. See *United States* v. *Melville*, 306 F. Supp. 124, 127-128 (S.D.N.Y.); cf. *Carbo* v. *United States*, 82 S. Ct. 662, 665-669 (Douglas, J.); *Fernandez* v. *United States*, 81 S. Ct. 642, 644-645 (Harlan, J.); *United States* v. *Wind*, 527 F. 2d 672, 674-675 (C.A. 6); *United States* v. *Bentvena*, 288 F. 2d 442, 444 (C.A. 2). As this Court stated in *Stack* v. *Boyle*, 342 U.S. 1, 4: "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial." Consequently, if there are, as here, no release conditions that would provide such assurance, denial of bail is justified. See *United States* v. *Melville*, *supra*, 306 F. Supp. at 127-128; cf. *Ward* v. *United States*, 76 S. Ct. 1063, 1066 (Frankfurter, J.).[8]

The instant case falls into that narrow category. After consideration of the factors relevant to a bail determination under 18 U.S.C. 3146(b), the district court specifically found that none of the conditions of release set out in Section 3146(a) would "reasonably assure the appearance of [applicant] for trial if admitted to bail" (Pet. App. 7a). This conclusion was amply supported by the evidence of

> defendant's jail escape in New Jersey, his defaulting on a $100,000 cash bond in [the district court,] and his proclivity for living in different parts of this country, Canada and the Bahamas under multiple fictitious names, as well as the pendency of revocation of probation proceedings and contempt proceedings against him in Federal District Courts in New York and Michigan, his serious legal problems with the State of New Jersey because of the jail escape, and his exposure to a maximum sentence in the instant case of a fine of not more than $10,000 and imprisonment for not more than five years, or both * * *. [Pet. App. 6a-7a.]

[8]Furthermore, without running afoul of the Eighth Amendment's proscription of excessive bail, the district court no doubt could have fixed bail at an amount petitioner would have been unable to make. See *Stack* v. *Boyle*, *supra*, 342 U.S. at 10 (Jackson, J.); *United States* v. *Herman*, 544 F. 2d 791, 794, n. 5 (C.A. 5); *Allen* v. *United States*, 386 F. 2d 634, 635 (C.A.D.C.); *White* v. *United States*, 330 F. 2d 811, 814 (C.A. 8), certiorari denied, 379 U.S. 855.



Accordingly, on the extraordinary factual record before the district court in this case, the order denying bail was necessary to assure petitioner's presence at trial and was therefore justified.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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